SC93026

IN THE MISSOURI SUPREME COURT

COLUMBIA CASUALTY COMPANY,

Appellant,

v.

HIAR HOLDINGS, L.L.C. and HMA RIVERPORT L.L.C.,

and

KAREN S. LITTLE, LLC, individually and on behalf of the other members of the certified class, as assignees,

Respondents.

Appeal from the Circuit Court of St. Louis County, Missouri

The Honorable Mark D. Seigel

Circuit Court No. 07SL-CC-00520

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SUMMARY OF THE ARGUMENT

A duty to indemnify the Settlement exists only if there is uncontroverted evidence that the corpus of the Settlement satisfies the Columbia Policy's coverage grant and is not otherwise excluded. Here, there is no coverage for a violation of the TCPA for sending unsolicited faxes.

The Court of Appeals correctly found no "property damage" coverage in light of Olsen, and held: (1) liquidated TCPA statutory penalties—versus actual damages—are a penalty; and (2) these penalties are thus not "damages" under the Columbia Policy language. Thus, based upon Olsen, the Court of Appeals correctly found no duty to indemnify under either the "property damage" or "advertising injury" coverages, and this Court should affirm the ruling below.

Olsen is consistent with Missouri precedent, including this Court's holding in Farmland. To abrogate Olsen, as suggested by Little, would upend numerous opinions of this Court and the appellate courts below. Nonetheless, if the Court revisits the holding in Olsen, and finds that damages under the TCPA are compensatory, Little has presented little argument to support the numerous additional bases for denying and limiting coverage in this case.

As discussed in Columbia's initial brief, there was no "occurrence" to invoke "property damage" coverage, and any damage was de minimis and, thus, uninsurable. Little failed to address this issue. "Advertising injury" coverage only applies to invasions of a person's privacy interest related to their right to secrecy in the content of an advertisement, which is not applicable here. Little sidesteps this argument. Here, HIAR and Little agreed to a collusive settlement in which they stipulated to liability for damages. Not only was the settlement far beyond the policy limits, but it never would pass a Gulf Insurance reasonableness test, which the trial court improperly refused to consider.

Separately, there is no bad faith claim that could have subjected Columbia to liability in excess of the Columbia Policy's $2,000,000 limit. Little's arguments conflate the duty to defend and duty to indemnify such that the reasoning in Respondent's Brief is unsound. Little fails to show that coverage would be present absent the correct ruling in Olsen that dictated the result reached by the Court of Appeals. Therefore, the judgment of the trial court should be reversed and the matter should be remanded for entry of summary judgment in Columbia's favor.

ARGUMENT

A. The Duty to Indemnify Standard

HIAR and Columbia settled all claims arising out of the duty to defend, and Little never received an assignment of rights for the duty to defend. Therefore, no claim concerning the duty to defend is at issue—including claims for breach of the duty to defend. All that is at issue here is the duty to indemnify. Therefore, Little's focus throughout its brief on the duty to defend—and the standard under which an insurer may be relieved of the duty to defend—is erroneous and improper.

The duty to indemnify is not determined based upon mere allegations. Rather, actual facts, as determined by a judge or jury, determine whether the duty to indemnify arises. McCormack Baron Mgmt. Servs., v. Am. Guar. & Liab. Ins., 989 S.W.2d 168, 173 (Mo. 1999) (holding that the adjudication of an insurer's duty to indemnify was not ripe because the insured relied solely upon the allegations of the complaint). As discussed below, the facts and operative policy provisions show that no duty to indemnify exists for this TCPA claim. Consequently, the Court of Appeals correctly held that Columbia has no duty to indemnify the settlement.

B. TCPA Relief Is an Uninsurable Penalty

1. **Fines and Penalties Are Not "Damages"**

Even under a "broad and inclusive" construction, as suggested by Little, "damages" do not include fines and penalties. See Farmland Indus. v. Rep. Ins., 941 S.W.2d 505, 510-11 (Mo. 1997) ("[F]ines or penalties are not included within the ordinary meaning of 'damages.' The ordinary meaning of 'fine' or 'penalty' is not compensation or reparation for an injury; rather, it is a sum imposed as punishment."). This Court found that the term "damages" "is used to make clear that insurers are obligated to cover both direct and consequential losses . . . for which an insured can be held liable." Id. at 510. Therefore, the ordinary meaning of "damages" does not include non-compensatory sums imposed as punishment, such as penalties. Id. The Farmland holding is well reasoned and binding in this case. Id.

Little's tortured analysis misses the point. The reason why Farmland held that "damages" includes compensatory sums (but not non-compensatory sums) was to give liberal effect to the policy language. Id. at 511. As the Court observed, the phrase "all sums which the insured shall become legally obligated to pay" differs from the phrase "all sums which the insured shall become legally obligated to pay as damages." Id. at

511. The latter language (i.e., "all sums which the insured shall become legally obligated to pay as damages") defines the scope of coverage to include compensatory sums only, whereas the former language does not. Id. at 511.

The same logic carries through in this case. To give effect to the phrase, "all sums which the insured shall become legally obligated to pay as damages," the scope of coverage must include compensatory sums only. Likewise, non-compensatory sums imposed as punishment (like penalties) are not included in the scope of coverage under the Columbia Policy.

Little argues that the Court below applied a "technical or legalistic" construction to the Columbia Policy language. This assertion is false. Farmland construed identical policy language liberally and found that the language imposed an important limitation on the scope of coverage. Little does not, and cannot, cite to a single case in support of the position that a penalty is "damages" as a matter of Missouri law.

Rather than focus on the gaping lack of authority for Little's position, Little instead focuses on trivial points from the Olsen decision. Little contends that Olsen improperly cited a dissenting opinion from this Court. Nonetheless, the dissent accurately characterizes the state of Missouri law, as it developed following the dissent. See Olsen v. Siddiqi, 371 S.W.3d 93, 97 (Mo.App. 2012), transfer denied, (Mo. Aug. 14, 2012) (citing State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S.W. 191, 212 (Mo. 1906) (Marshall, J. dissenting)); see also Julian v. Burrus, 600 S.W.2d 133, 141 (Mo.App. 1980) (analyzing the character of statutory relief to determine whether the statute imposed a penalty; finding that a usury statute imposed a "penalty" because, among other things, no right of action existed at common law for the civil liability imposed by the statute. Little also argues that Collier v. Roth, 468 S.W.2d 57, 60 (Mo.App. 1971), is not relevant. Nonetheless, that opinion accurately held that statutes may be both remedial and penal, and should be considered penal in nature when the penalty is sought. Id. Significantly, Collier also held that penal statutes encompass "laws that permit recovery of a penalty by an individual as well as by public prosecution." Id. (citing 82 C.J.S. Statutes § 389 at 922-924) (further finding that Missouri statutes that permit double or triple recovery and statutory damages for vexatious delay have been declared to be penal). Meanwhile, the Court of Appeals properly applied these cases and properly analyzed the language of the Columbia Policy, finding that the language does not insure against penalties.

The Settlement was a gamble that the Columbia Policy would provide coverage. It does not. That Little lost this bet does not mean the Court of Appeals incorrectly applied Missouri law. To the contrary, the Court of Appeals twice correctly found under this Court's precedent that the term "damages" defines the scope of coverage to include compensatory sums only—not non-compensatory penalties. This holding should be affirmed.

2. The TCPA Is Both Remedial and Penal

Little incorrectly argues that the TCPA's $500 liquidated amount serves the same purpose as actual damages. Little also incorrectly contends that the TCPA serves the same purpose as general damages, but it has no authority for this position. The TCPA makes available actual damages as a separate subcategory of damages, and plainly does not support Little's arguments. Thus, it is beyond question that liquidated relief under the TCPA serves a deterrent, penal function.

The TCPA is a hybrid statute that provides for actual damages, liquidated relief (without a showing a scienter), or trebled liquidated relief (with a showing of scienter). 47 U.S.C. § 227(b)(3)(B). The TCPA is remedial (when individuals seek actual damages) and penal (when individuals seek liquidated statutory relief). Olsen, 371 S.W.3d at 97. The liquidated relief dwarfs any actual damages suffered by fax recipients (i.e., pennies per fax). Id.

This Court has characterized liquidated relief under the TCPA as a penalty. Harjoe v. Herz Fin., 108 S.W.3d 653 (Mo. 2003) (characterizing the $500 amount as a "penalty" that deters future violations of the TCPA). The Court of Appeals properly applied this precedent. The Court of Appeals also properly recognized the direct correlation between the per-claimant Settlement amount and the $500 penalty. (Little, at 4 n.2.)

Many courts agree that the $500 amount is a penalty. See Kruse v. McKenna, 178 P.3d 1198, 1201 (Colo. 2008) (finding that liquidated relief under the TCPA "is a claim for a penalty"); U.S. Fax Law Ctr. v. T2 Techs., 183 P.3d 642, 647 (Colo. Ct. App. 2007) ("The monetary recovery sought here on the TCPA claims is a penalty. It requires no proof of actual damages, and it would constitute a recovery far in excess of any actual damages that plaintiff's assignor may have sustained."); Edwards v. Emperor's Garden Rest., 122 Nev. 317, 327, 130 P.3d 1280, 1286 (Nev. 2006) (describing liquidated relief under the TCPA as "statutory penalties"); US Fax Law Ctr. v. iHire, 362 F. Supp. 2d

1248, 1253 (D. Colo. 2005) (finding that the TCPA imposes a "penalty in excess of actual damages" because $500 per violation "is much more than the fax-machine operation and paper cost of . . . 'a few pennies per alleged violation'"); Kaplan v. Democrat & Chronicle, 698 N.Y.S.2d 799 (App. Div. 1999) (finding that actual monetary losses from TCPA claims "are likely to be minimal" and, as such, "a statutory penalty is necessary to provide incentive for consumers to enforce the statute"); see also Standard Mut. Ins. v. Lay, 975 N.E.2d 1099, 1106, reh'g denied, (June 11, 2012), appeal allowed, 979 N.E.2d 889 (Ill. 2012) ("We find the $500 in liquidated damages provided in the TCPA is a penalty and is in the nature of punitive damages."); Landsman & Funk PC v. Skinder-Strauss, 640 F.3d 72, 102 (3d Cir. 2011) ("[T]he penalty for violating TCPA was $500 . . . ."). Ample authority supports the Court of Appeals' finding that the Settlement resolved HIAR's liability for statutory penalties.

Little characterizes the $500 amount as "remedial" because that sum accrues to a private litigant. This distinction is arbitrary. See Kruse, 178 P.3d at 1201 (expressly rejecting a characterization of the statute as remedial based upon the arbitrary distinction of who may collect the penalty). Little's argument fails to account for the punitive, deterrent purpose of the $500 amount vis-à-vis de minimis actual damages. See id. It also fails to explain why a $500 violation without scienter should be treated differently than a $1,500 violation with scienter, when both penalties serve the purpose of deterrence.[1]

Contrary to Little's contention, Missouri courts have, in fact, analyzed the purpose of a statute to determine whether the statute imposes a penalty. Compare Julian, 600 S.W.2d at 142 (reviewing the purpose of a statutory civil right of action and concluding that it provide a penalty or forfeiture, although collectible by a private litigant); Collier, 468 S.W.2d at 60, with Tabor v. Ford, 240 S.W.2d 737, 740 (Mo.App. 1951) (determining whether a magistrate had jurisdiction to hear a penal action). Therefore, the Court of Appeals properly rejected Little's distinction in this context.

Little's own legal argument compels the conclusion that the $500 amount is a penalty. Little states that intended recipients may receive $500 even where a fax transmission fails. (Little Opp'n Br. 51-2; see also LF2347.) Under this logic, there is no doubt that the $500 amount serves no compensatory function and, indeed, is purely

[1] Little spends pages of its brief arguing that the TCPA is intended to protect privacy rights. Nonetheless, the portions of the TCPA cited by Little refer to automatic telephone dialers—not junk faxes. See H.R. Rep. No. 102-317, at 5-6 (1991) (referring to "residential telephone subscribers"). The portion of the TCPA dealing with junk faxes was intended as an economic regulation. Id. at 25; see also All Am. Painting, LLC v. Fin. Solutions, 315 S.W.3d 719, 724 (Mo. 2010) (finding that the TCPA was intended to protect against the cost of "ink and paper that was consumed to print . . . advertisements.").

deterrent and penal. Therefore, the result reached by the Court of Appeals properly characterized the $500 statutory amount as a penalty because even an uninjured litigant may collect it.

C. "Property Damage" Coverage Does Not Apply

"Property damage" is defined under the Policy to mean "Physical injury to tangible property" or "Loss of use of tangible property that is not physically injured." A penalty is not "Physical injury to tangible property" or "Loss of use of tangible property that is not physically injured." Therefore, Columbia has no duty to indemnify the Settlement under the "property damage" coverage.[2]

1. Any "Property Damage" Was de Minimis

To the extent that the penalty serves any compensatory function, the actual damages component of the penalty would be minimal. As such, the actual damages would not be entitled to relief under the doctrine of de minimis non curat lex. See Schulte v. Florian, 370 S.W.2d 623, 625 (Mo.App. 1963) (affirming directed verdict where the defendant allegedly used a plaster mixing machine owned by the plaintiff and left the machine in a dirty condition, because "[t]here was no evidence introduced, and no

[2] Given that there is no "property damage," there can be no "property damage" falling within the "products-completed operations hazard." (LF165.) Therefore, the Circuit Court's ruling that the Columbia Policy's limit of insurance should be expanded due to the "products-completed operations hazard" must be reversed as well. (LF3463-66.) Columbia properly raised this issue in its initial brief. (Columbia Br. 30 n.4.)

proof offered, that plaintiff sustained any actual damages on account of defendant's use of the machine or any loss of any kind on account of being deprived of its use."); see also Rossario's Fine Jewelry v. Paddock Publications, 443 F. Supp. 2d 976, 980 (N.D. Ill. 2006) (dismissing a conversion claim in a TCPA litigation because "the ancient maxim 'de minimis non curat lex' might well have been coined for this occasion").

The Class' actual damages (if any) were so minimal that they did not pursue "actual damages." Thus, any component of the $500 amount that accounts for "actual damages" would not be insurable under the doctrine of de minimis non curat lex. Little failed to respond to this argument and, therefore, conceded this issue. Moreover, to the extent that the $500 amount represents an incentive or attorney's fee, Little cites no authority for the position that such amounts are insurable as matter of Missouri law.

2. There Was No "Occurrence"

In order for the Columbia Policy to cover "property damage," the "property damage" must be caused by an "occurrence." Little incorrectly contends that an "occurrence" took place under the "property damage" coverage. However, there is no "occurrence" if the insured expected or intended to injure a claimant. D.R. Sherry Constr. Ltd. v. Am. Family Ins., 316 S.W.3d 899, 905 (Mo. 2010).

Here, the evidence clearly demonstrates that HIAR expected and intended the exact injury suffered by the Class—receipt of faxes. (LF1945 at 28:24-25 to LF1946 at 29:1-11; LF1945 at 28:6-15; LF1949 at 49:20-25; LF1950 at 50:1-10.) This fact is dispositive of the "occurrence" analysis. D.R. Sherry Constr., 316 S.W.3d at 905 ("The determinative inquiry into whether there was an 'occurrence' or 'accident' is whether the insured foresaw or expected the injury or damages.").

Little presented no contrary evidence. Rather, Little cites: (1) allegations of negligent conduct in the TCPA Complaint (which is peculiar given that the TCPA is a strict liability statute); (2) HIAR's self-serving affidavit regarding its intent to violate the TCPA; and (3) numerous duty to defend cases—none of which is relevant in a duty to indemnify analysis. (Little Opp'n Br. 34, 37-40.)

HIAR's intent to violate the TCPA is irrelevant; what matters is HIAR's intent to send faxes to the Class. The evidence proves that HIAR did intend to send the faxes to the Class, and that the transmission of faxes is the injury about which the Class complains. This is dispositive of the "occurrence" issue and the "expected or intended injury" exclusion issue. See Am. States Ins. v. Capital Assocs., 392 F.3d 939, 943 (7th Cir. 2004) (Easterbrook, J.) (barring coverage for a TCPA claim under the expected or intended injury exclusion); St. Paul Fire & Marine Ins. v. Brother Int'l., 319 Fed. App'x 121, 127 (3rd Cir. 2009) ("[The insured] must have expected or intended that damage to occur when it engaged in blast-faxing."); Maxum Indem. v. Eclipse Mfg., 848 F. Supp. 2d 871, 880-1 (N.D. Ill. 2012). Thus, even in the absence of the Court of Appeals decisions in Olsen and in this matter, intentionally broadcasting junk faxes is not an "occurrence."

D. "Advertising Injury" Coverage Does Not Apply

Little argues that the Columbia Policy covers everything that is not excluded. This is factually and legally incorrect. The insured bears the burden of showing that a claim falls within the Policy's "insuring agreement." Am. States Ins. v. Mathis, 974 S.W.2d 647, 649 (Mo.App. 1998). Little, as assignee, shares this burden of proof. Johnston v. Sweany, 68 S.W.3d 398, 401 (Mo. 2002).

"Advertising injury" coverage is triggered only by content-based offenses committed by the insured. The offenses specifically enumerated in the Columbia Policy include: (1) material that slanders or libels; (2) misappropriation of advertising ideas; and (3) infringement of copyright, title, or slogan. The offenses each concern harms caused by the content of the material at issue. State Farm Gen. Ins. v. JT's Frames, 181 Cal. App. 4th 429, 448 (2d Dist. 2010), rev. denied, (Apr. 28, 2010). The offense of "material that violates a person's right of privacy," the only offense that Little contends is potentially applicable, likewise requires a harm caused by the content of the material at issue. Id.

Numerous well reasoned authorities from around the nation agree with this approach. See, e.g., Am. States Ins., 392 F.3d at 941 ("Looking at the relevant definition of advertising injury in context persuades us that the advertising injury coverage applies only to content-based claims"); Telecommc'ns Network Design v. Brethren Mut. Ins., 2010 PA Super 155 (2010), appeal denied, 2011 WL 1661515 (Pa. May 3, 2011) ("[I]t is clear...that the term 'privacy' is confined to secrecy interests.");Res. Bankshares Corp. v. St. Paul Mercury Ins., 407 F.3d 631, 641 (4th Cir. 2005) ("[T]hese four offenses all share the common thread of assuming that the victim of the advertising injury offense is harmed by the sharing of the content of the ad, not the mere receipt of the advertisement.").

These Courts read the insurance policies as a whole and in context, just as Missouri law requires. See Todd v. Mo. U. Sch. Ins. Council, 223 S.W.3d 156, 160 (Mo. 2007). Undefined terms should be given their ordinary meaning, consistent with the intent of the parties. Read in the context of the Columbia Policy as a whole, the offense of "material that violates a person's right to privacy" must mean privacy rights arising out of the material itself. JT's Frames, 181 Cal. App. 4th at 448 ("Definitions 1, 3, and 4 all involve injury caused by the information contained in the advertisement. In each of these cases, the victim is injured by the content of the advertisement, not its mere sending and receipt.").

Little asserts that a content-based offense exists here because the TCPA penalizes advertisements (versus other communications). This argument fails to grasp even a basic understanding of the content-based offenses. Whether the TCPA penalizes the transmission of advertisements is irrelevant; the content of the advertisement must violate a person's privacy rights and cause the harm in order for coverage to apply.

Here, Little did not allege or prove that the content of the faxes violated a secrecy right. Therefore, the claims at issue in the Petition, and the claims purportedly resolved under the Settlement, do not fall within the Policy's "advertising injury" coverage.

"Advertising injury" also does not apply because the offense at issue only covers harm to natural persons. The words "person" and "organization" have different meanings under the Policy. Mirpad, LLC v. Cal. Ins. Guar., 132 Cal. App. 4th 1058, 1073 (2d Dist. 2005). This makes perfect sense in this context because incorporeal organizations do not have privacy rights. Bear Foot v. Chandler, 965 S.W.2d 386 (Mo.App. 1998) (incorporeal entities have no privacy right of seclusion). The offense only extends to harm to a "person"—and Little is an incorporeal organization (i.e., a limited liability company). See Erie Ins. Exch. v. Kevin T. Watts, No. 1:05-CV-00867, 2006 WL 3776255, at *6 (S.D. Ind. Dec. 19, 2006) (finding no coverage in part because named plaintiff in class action was a corporation, "lacking the necessary legal interests to pursue an invasion of privacy claim").

The absence of the word "organization" in the offense at issue limits the scope of coverage to corporeal persons. The Columbia Policy makes this critical distinction throughout, and in this instance, precludes coverage for the incorporeal entity that serves as class representative under the Settlement, i.e., Karen S. Little, L.L.C. This rationale also harmonizes with the common law, which does not recognize privacy rights for incorporeal organizations. The TCPA was an economic regulation intended to deter advertisers from shifting the costs of advertising onto recipients. See H.R. Rep. No. 102-317, at 25 (1991). It was not enacted to provide corporations with a "new" privacy right. Therefore, Little has not proven that "advertising injury" coverage applies.

E. The Penal Statute Exclusion Bars Coverage

The Policy excludes coverage for an "advertising injury" "arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured." (LF159.) Liquidated relief under the TCPA is a penalty. Little's brief confirms that the Settlement negotiated statutory penalties on a class-wide basis, not actual damages. (Little Opp'n Br. 51 ("The Judgment amount of $5,000,000.00 is reasonable because HIAR's 12,500 faxes exposed it to statutory liability of 25% more than the amount of the judgment, or $6,250,000.”)) Therefore, the Court of Appeals correctly recognized that the Settlement represented the compromise of statutory penalties. See Little, at 4 n.2.

Moreover, a “willful” violation of the TCPA is merely a violation with scienter (as opposed to a violation without scienter). See 47 U.S.C. § 312(f)(1). Under the TCPA, “willful” means “the conscious and deliberate commission or omission of such act [i.e., sending a junk fax], irrespective of any intent to violate any provision [of the TCPA].” Id. HIAR admitted at deposition that it consciously and deliberately sent faxes to Little (and the Class). (LF1945 at 28:6-15; LF1949 at 49:20-25 to LF1950 50:1-10.) It does not matter that HIAR may have lacked knowledge of the TCPA or intent to violate the TCPA. The evidence demonstrates that HIAR willfully violated the TCPA—regardless of boilerplate allegations of negligent conduct. Little offers no evidence to the contrary. Therefore, the penal statute exclusion clearly bars coverage for this claim.

F. The Contractual Liability Exclusions Bar Coverage

The Policy excludes “property damage” which the insured is obligated to pay “by reason of the assumption of liability in a contract or agreement” and “advertising injury” “for which the insured has assumed liability in a contract or agreement.” (LF156; LF159.)

Only 488 of the supposed 10,000-strong Class made a claim under the Settlement. (LF1589 at 11:20 to 12:6; LF1607 at 83:23 to 84:5; LF 2484.) According to the “Proof of Claim Form” approved by the Circuit Court, any Class member who did not mail a proof of claim form “WILL NOT RECEIVE A SHARE OF ANY POTENTIAL SETTLEMENT PROCEEDS.” (LF2039.) The Circuit Court ruled that all Claims Forms must be "returned on or before July 23, 2007, or be barred." (LF2114 (emphasis added.)) Likewise, the "Final Judgment" dated April 12, 2007 permits only those Class members who submitted claim forms to participate in the Settlement. (LF122.) Clearly, the only injury for which coverage is sought is 488 multiplied by $500. Little's suggestion otherwise is misleading at best.

HIAR gratuitously assumed at least $4,756,000 in liability without any legal obligation to do so. That Little's attorneys may donate $4,756,000 to an unnamed cy pres charity does not change the fact that HIAR gratuitously assumed this entire amount. Thus, the Court of Appeals correctly found that the contractual liability exclusions apply because "the liability that HIAR assumed by virtue of the settlement contract is for something other than 'damages' that it would have had absent the agreement." (Little, at 4.)

G. Columbia May Challenge the Settlement

Little incorrectly argues, as it did below, that Columbia is "precluded" from challenging the Settlement as unreasonable because the TCPA Court held a fairness hearing. (Little Opp'n Br. 47.) An insured's settlement of a claim must be reasonable to bind an insurer, and this standard differs from the standard applicable to approving a class-wide settlement. See Gulf Ins. v. Noble Broadcast, 936 S.W.2d 810, 815-16 (Mo. 1997); Borgard v. Integrated Nat'l Life Ins., 954 S.W.2d 532, 537 (Mo.App. 1997) (an insurer has an "absolute right" to challenge the insured's settlement as unreasonable).

1. To Bind an Insurer, a Covenant-Not-to-Execute Settlement Must Be Reasonable

Gulf Insurance and its progeny apply to section 537.065 agreements. Little concedes that the Settlement is a section 537.065 agreement. (Little Opp'n Br. 45.)[3] Nonetheless, Little offers no explanation as to why Gulf Insurance does not apply to the one-sided presentation of evidence that took place during the Settlement "fairness" hearing. A reasonableness hearing must be held even if another court approved of an underlying settlement. See Auto-Owners Ins. v. Ennulat, 231 S.W.3d 297, 303-4 (Mo.App. 2007). Therefore, Gulf Insurance applies.

Gulf Insurance recognized the right of insurers to challenge the enforceability of settlements where insureds act solely in their own self-interest, thereby escaping any liability for damages:

> Requiring a settlement to be reasonable strikes an appropriate balance between the interest of the insured and the interest of the insurer. In cases such as the present case, the insurer has refused to defend, leaving the insured to fend for itself. The insured, however, although not engaging in collusive conduct for fraudulent or deceitful purpose, may act in a self-

[3] Little later denies that the rules applicable to section 537.065 agreements apply. (Little Opp'n Br. 47-8.)

> interested way in an attempt to protect [it]self from personal liability.

Gulf Insurance, 936 S.W.2d at 815-16 (citing Steil v. Fla. Physician's Ins. Reciprocal, 448 So.2d 589 (Fla. Dist. Ct. App. 1984) (recognizing the right to challenge reasonableness in covenant-not-to-execute settlements); Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982) (same)).

Like the insured in Gulf Insurance, HIAR entered into a Settlement in which it paid nothing.[4] Such settlements are potentially unfair and must be reasonable to be enforceable against an insurer. Id.; Ennulat, 231 S.W.3d at 304. Therefore, Gulf Insurance applies to the Settlement.

Little makes the unfounded argument that Schmitz v. Great American Assurance Company, 337 S.W.3d 700 (Mo. 2011), abrogates Columbia's right to a Gulf Insurance reasonableness determination. Schmitz, however, demonstrates a fundamental flaw in Little's reasoning. In Schmitz, unlike here, the parties merely agreed that the claimant would recover (if at all) from any available insurance—the parties did not concede liability and damages. In other words, the settlement in Schmitz "did not admit liability or damages." Id. at 709. Therefore, the trial court "could have found that [the insured] was not liable or that no damages were suffered." Id.

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[4] Unlike Gulf Insurance, where the insured settled within the policy limit, HIAR's Settlement exceeds the Policy limit by $3,000,000.

Little contends that a class-action fairness hearing has "roughly" the same procedural safeguards as a trial. This is false. This Court recognized the procedural safeguards that the trial in Schmitz provided:

> The structure of the section 537.065 agreement actually gave [the insurer] more protection than a settlement that admitted liability and determined damages. The [claimants] still had the burden to prove liability and damages in a bench trial…. The judgment here is not a settlement and is not subject to the Gulf Insurance reasonableness test.

Id. (emphasis added). In Schmitz, a trial—not the parties—established liability and damages. Id. Because the trial established liability and damages, there was no need to test the judgment for reasonableness. Id. at 709. For this reason and this reason alone, a Gulf Insurance reasonableness test was not necessary. See id.

Here, the Settlement alone established HIAR's liability for damages. HIAR had nothing to lose by entering into a $5,000,000 Settlement because it would never be required to pay for any of it. The TCPA Court never conducted a trial or inquired into the fairness of the Settlement vis-à-vis Columbia—i.e., the party that would be required to pay the entirety of the Settlement. (LF112-128; LF2117-32.) This is exactly the one-sided presentation of evidence for which Gulf Insurance was established.

Had evidence been presented at trial, the TCPA Action could have been dismissed because Little (and the other class members) lack proof of receiving faxes from HIAR. (LF2183 at 22:13-25; LF2184 at 23:1-23; LF2223 at 22:3-25, 23:1-25, 24:1-25; LF2224 at 25:1-19.) In ruling upon fairness of a Settlement—as opposed to the presentation of evidence at trial—the TCPA Court had no choice but to rely upon the representations of HIAR and Little.

Hearings on class-wide settlements do not reach the same issues or levels of proof as trials. See Ring v. Metro. St. Louis Sewer Dist., 41 S.W.3d 487, 492 (Mo.App. 2000) (Ahrens, J.) (concluding that an important consideration in approving a class-wide settlement is the strength of the lawsuit balanced against the offered settlement). Significantly, Little's argument about the applicability of Schmitz found no traction with Judge Ahrens below. It should find no traction here. The only reason why HIAR settled on worst-case terms was because it never would be required to pay one penny of the Settlement.

The contrast between this case and Schmitz could not be more clear. In Schmitz, the Missouri Supreme Court repeatedly recognized that the insured did not concede liability or damages and that only a trial determined those issues. Id. at 703-4, 709-10 (reasoning that "a bench trial was held," "judgment entered after a bench trial," "[t]here was no agreement concerning the insured's liability or damages [because] those matters would be submitted to the trial court," "judgment entered after a bench trial," claimants "still had the burden to prove liability and damages in a bench trial," "judgment was rendered after an actual trial on the issue of liability and damages").

The distinction between the Settlement, which admitted liability and damages, and a settlement in which those issues are determined through a trial is cited repeatedly by courts in deciding whether an insurer is entitled to challenge reasonableness. See, e.g., Ennulat, 231 S.W.3d at 304 (holding that an insurer is entitled to challenge settlement that stipulated liability and damages); Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 95-96 (Mo.App. 2005) (no challenge where trial held on damages); see also Taggart v. Md. Cas., 242 S.W.3d 755, 759 (Mo.App. 2008) ("This court has applied Gulf Insurance even when the circuit court held a hearing in which it considered testimony under oath and the plaintiffs introduced evidence of the defendant's negligence and called numerous witnesses regarding plaintiffs' damages.").

HIAR admitted liability and damages in the Settlement. No trial was held. Therefore, Columbia is entitled to challenge the Settlement's reasonableness, and the Circuit Court erred in denying Columbia this opportunity.

2. Estoppel Does Not Apply

Little argues that collateral estoppel precludes Columbia's challenge of the Settlement. Little, however, never showed that: (1) there was an identity of issues; (2) the prior adjudication was a judgment on the merits; (3) Columbia was in privity with HIAR; and (4) Columbia had a full and fair opportunity to litigate the issue in the prior suit. James v. Paul, 49 S.W.3d 678, 682 (Mo. 2001).

First, different issues are involved in the TCPA Action and in a Gulf Insurance reasonableness determination. Class action fairness hearings determine whether settlements are fair to the class, with the court owing a fiduciary duty to absent class members. Amchem Prods. v. Windsor, 521 U.S. 591, 623 (1997); Dale v. DaimlerChrysler Corp., 204 S.W.3d 151, 174 (Mo.App. 2006). Fairness to the defendant—or its insurer—is irrelevant.

Conversely, <u>Gulf Insurance</u> reasonableness hearings determine whether settlements are fair <u>to the insurer</u>. <u>See</u> 936 S.W.2d at 815-16. The standard is "what a reasonably prudent person in the position of the defendant [insured] would have settled for on the merits of the plaintiff's claim." <u>Id.</u> at 816. Fairness to the plaintiff/class is irrelevant. The TCPA Court simply <u>could</u> <u>not</u> have considered this issue given its fiduciary duty to the class. Therefore, the TCPA Court's finding that the Settlement was fair and reasonable to HIAR or Columbia should be disregarded as overreaching, improper, and irrelevant.

Second, there was no judgment on the merits. A ruling approving a class action settlement is not a judgment on the merits. A "judgment on the merits" is "rendered after argument and investigation and when it is determined which party is in the right, <u>as distinguished from a judgment rendered upon some preliminary or technical point, or by default, and without trial</u>." <u>Hayes v. U. Fire & Cas.</u>, 3 S.W.3d 853, 856 (Mo.App. 1999) (emphasis added). The Settlement did not determine "which party is in the right" and was "rendered…without trial." Therefore, there was no judgment on the merits.

Third, Columbia was not in privity with HIAR. Privity exists when the party sought to be estopped "has interests that are so closely aligned to the party in the earlier litigation that the non-party can be fairly said to have had its day in court" on the issue in dispute. <u>James</u>, 49 S.W.3d at 683. HIAR's interest in declaring the Settlement enforceable directly conflicted with Columbia's interest in challenging the Settlement. HIAR would not be liable for the Settlement, and Columbia would. Therefore, there was no privity of interest. <u>See</u> <u>Cox v. Steck</u>, 992 S.W.2d 22, 224 (Mo.App. 1999).

Fourth, Columbia did not have "a full and fair opportunity to litigate" the issue of reasonableness. A full and fair opportunity to litigate exists where the insurer had the opportunity to raise the issue in the underlying action. Morgan v. State Farm Fire & Cas., 344 S.W.3d 771, 778 (Mo.App. 2011). Columbia was deprived of this opportunity when liability and damages were agreed-upon by HIAR and Little.

Finally, the Settlement's enforceability against Columbia was not "essential" to or "necessarily and unambiguously" determined by the Consent Judgment. King Gen. Contractors v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495, 501 (Mo. 1991). Class action fairness hearings determine fairness to absent class members. To find a settlement reasonable under Rule 52.08, a court need only determine that the settlement is fair to the class. The court can approve a settlement without determining whether the defendant settled in good faith and as a reasonably prudent insured. Therefore, the TCPA Court's findings on HIAR's good faith and reasonableness as an insured were not necessary or essential to the ruling approving the Settlement.

H. Columbia Is Not Liable for Extra-Contractual Damages

No authority supports an award of extra-contractual damages (i.e., those beyond the policy limits) absent a claim for bad faith. Little never asserted a bad faith claim and essentially concedes this in its brief. (LF545-46.) Moreover, Columbia settled all such claims with HIAR. That settlement expressly released all claims brought by HIAR and HMA against Columbia including HIAR's counterclaims for breach of contract and bad faith. (LF3327-29.) Therefore, Little cannot recover extra-contractual damages.

The cases that Little cites highlight the flaw in its argument. For example, Truck Insurance Exchange v. Prairie Framing, LLC, 162 S.W.3d 64 (Mo.App. 2005), held that extra-contractual damages are awarded only for a bad faith claim. Prairie Framing also undercuts Little's argument that extra-contractual damages can be awarded at the summary judgment stage. Specifically, Prairie Framing reversed the trial court's grant of summary judgment, concluding, "[B]ad faith...is a state of mind" involving a fact question that usually can be resolved only through a trial. Id. at 95 (quoting Zumwalt v. Util. Ins., 228 S.W.2d 750 (Mo. 1950)); Shobe v. Kelly, 279 S.W.3d 203, 211 (Mo.App. 2009) (bad faith claim required jury trial).

Little argues that Schmitz requires an award of extra-contractual damages even where there is no bad faith. (Little Opp'n Br. 54) Little also argues that this Court never specified the policy limits in that case. (Id.) These statements are incorrect. This Court stated, "Virginia Surety's policy [i.e., the primary policy] provided primary coverage of $1 million, and Great American's policy [i.e., the excess policy] provided excess coverage of $4 million." Schmitz, 337 S.W.3d at 704. The total damages, after setoffs, were $2,880,076. Id. at 705 n.4. Therefore, Schmitz did not award extra-contractual damages beyond policy limits. The breach of contract damages that were awarded were within the policy limits. Schmitz simply does not involve an extra-contractual claim.

Every other case cited by Little involved a bad faith or tort claim. See Overcast v. Billings Mut. Ins., 11 S.W.3d 62 (Mo. 2000) (first-party insurance case involving claim for defamation and punitive damages); Zumwalt, 228 S.W.2d at 754 (bad faith failure to settle case); Shobe, 279 S.W.3d 203; Whitehead v. Lakeside Hosp. Ass'n, 844 S.W.2d

475, 483 (Mo.App. 1992) (no award of any damages, merely affirming trial court's denial of the insurer's motion to intervene in the underlying litigation).

Citing to the same cases, Little also incorrectly contends that Columbia's refusal to participate in settlement negotiations requires Columbia to provide coverage for the entire amount agreed-to by Little and HIAR under the Settlement. There is no legal support for this position. Little's own authorities hold that: (1) a party must file a claim seeking relief in the form of extra-contractual liability to recover on such a claim; and (2) a jury's finding of intent on the part of the insurer is required before imposing extra-contractual liability upon an insurer. See, e.g., Shobe, 279 S.W.3d at 211; Prairie Framing, 162 S.W.3d at 95 ("We are unable to hold that the facts in this case establish, as a matter of law, [the insurer's] bad faith."). Notably, the other cases cited by Little, Overcast, 11 S.W.3d at 66, did not involve a bad faith failure to settle but, rather, a claim of defamation against the insurer. Regardless, HIAR and Little never requested Columbia's participation in the Settlement—or even disclosed the basic framework of the Settlement to Columbia. There also is no judgment in excess of the Columbia Policy limits—rather, the Judgment reflects HIAR's concession under the Settlement of liability for an excess judgment.

Here, Little never asserted a bad faith counterclaim. Consequently, Little is barred from recovering extra-contractual damages. See Prairie Framing, 162 S.W. 3d at 94 (distinguishing breach of contract and bad faith claims). Even assuming coverage existed and Columbia could not challenge the reasonableness of the Settlement—neither of which exists here—Columbia's liability could be no greater than the $2,000,000

Columbia Policy limit.[5] Therefore, the Circuit Court erroneously held Columbia liable for extra-contractual damages, finding that the Policy limits "do not matter," in the absence of a claim for bad faith. (LF3467-75.)

CONCLUSION

WHEREFORE, Columbia respectfully requests that this Court reverse the Circuit Court's November 29, 2011 order and judgment and remand for entry of Summary Judgment in Columbia's favor, declaring that Columbia has no duty to indemnify the TCPA Action, Settlement, or Consent Judgment.

[5] The issue of extra-contractual liability would be moot had the Circuit Court permitted Columbia's proposed amendment seeking a declaratory judgment against HIAR's excess insurer. The failure to permit leave to amend to add a party that could be liable for a portion of the Settlement clearly was an abuse of discretion. Columbia suffered prejudice in that the Circuit Court held Columbia liable for the <u>entire</u> Settlement, in excess of the $2,000,000 Policy limit, where the non-party may be liable for the Settlement.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULES 55.03 AND 84.06

This brief complies with the requirements of Rule 55.03. This brief complies with the type-volume limitations of Missouri Supreme Court Rule 84.06 because this brief contains 7721 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and the type style requirements of Rule 84.06 because this brief has been prepared in a proportionally styled typeface using Microsoft Word in 13-point font size and Times New Roman type style.

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I hereby certify that on April 18, 2013, a true and correct copy of the foregoing brief was filed electronically using the Missouri e-Filing System, which automatically will send email notification to counsel of record, including:

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